BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33882

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, et al.

Appellee,

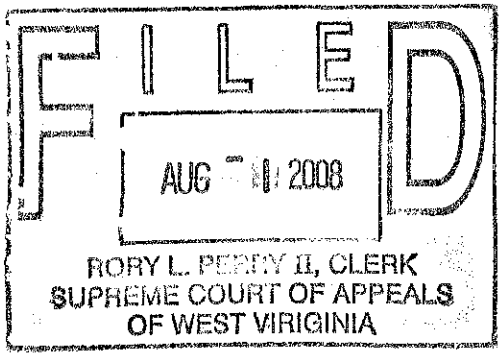
v.

Civil Action No. 04-C-710
Honorable Jeffrey B. Reed
Circuit Court of Wood County

PARKERSBURG INN, INC.,

Appellant.

REPLY BRIEF OF APPELLANT, PARKERSBURG INN, INC.



Respectfully submitted,

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I. INTRODUCTION

First, Wesbanco Bank, Inc. is a defendant below in this action and, by its counsel, joins in Appellant's argument. As set out below, Wesbanco has a substantial lien on the property.

The West Virginia Department of Transportation, Division of Highways (hereinafter referred to as "DOH"), in an obvious attempt to distract from the real issues on appeal, argues facts that are not at issue. Included in the DOH's argument is its first point that the Holiday Inn lost its Holiday Inn franchise because of its own decisions not to obtain a 10-year contract in 2002. Had this difficult decision not been made, such contract would still be effective and bind the Parkersburg Holiday Inn to paying mandatory franchise fees of hundreds of thousands of dollars whether it was open or not. (*See* DOH's Response Brief at pp. 1-2.)

A. FACTS NOT AT ISSUE

1. The Franchise Extension

In its brief, the DOH did not explain why the Holiday Inn was placed in the position of having to decline its contract renewal in the first place. Neither did the DOH explain the hardship created by the DOH's actions for the Holiday Inn from the late 1990s until trial of this case. The manager of the Holiday Inn, David Ashley, testified that the Holiday Inn was told in public meetings and by direct communications from the State that it was going to be totally taken and, at a later time, partially taken. Further exacerbating the problem, this coincided with the national Holiday Inn franchisor's requirement for the Holiday Inn to make huge improvements to the facility

in 2002, in order to remain a Holiday Inn. And, it required the Holiday Inn to enter into other contracts with its franchisor while the DOH continued giving out public and private information, which ultimately was false.

In the late 1990s and early 2000s, the Holiday Inn was to be totally taken by the Route 50 project. In fact, Mr. Ashley testified he resigned and took another job because of that information. (*See* Trial Transcript of David Ashley at 58-59.) Later, the Holiday Inn was notified it was to be partially taken, and the DOH actually sent the Holiday Inn a plan sheet showing the taking, and it was told that an appraiser would appraise its property. It should be noted that if the DOH had taken a portion of the property the DOH would have been required to institute an action and pay for the taking and damages. The construction plans for this project had the Holiday Inn's parcel on it as a property to be taken, but the DOH right-of-way plans were changed deleting the actual taking, without notifying the Holiday Inn.

Therefore, the reason the Holiday Inn entered into shorter contracts and extensions was because it was first told it was going to be totally taken and then was kept in a state of confusion for years. This is borne out by the fact that the Holiday Inn borrowed $2.6 million from Wesbanco[1] in November 2002. The Holiday Inn was required to do a major overhaul to the Parkersburg facility by its national franchisor. It borrowed millions to do that in 2002, and signed contracts to continue even in the face of the indecision of the DOH.

[1] Wesbanco is a named defendant along with the Holiday Inn in this inverse condemnation proceeding.

Therefore, the DOH's argument about the franchise issue is a red herring meant to distract this Court. The real reason the Holiday Inn lost the franchise was because the roadway so changed the landscape and access was no longer useful as a location for a Holiday Inn.

Michael Horgan, the national Holiday Inn regional manager, made a decision in 2006 to give the Parkersburg Holiday Inn franchise to a Chicago company to build a new Holiday Inn at a different Wood County I-77 exit. Mr. Horgan explained the reason for the decision was that the I-77/Route 50 exit was no longer suitable for a Holiday Inn after the new construction.

Q. Now, I believe you indicated that Mr. Holtz from Chicago had applied for a Holiday Inn Express franchise initially at a location near -- on the other side of Route 50 directly opposite where the Holiday Inn is; correct?

A. That is correct.

Q. And I believe you indicated that you went to that site, looked at it, and felt it was not a good location and would not recommend that it go there; correct?

A. That is correct.

Q. And if, assuming that the Holiday Inn property wasn't there where it is, that is the building wasn't there, would you feel the same way if someone applied for a location where the Holiday Inn is now?

A. Yes, I would.

Transcript of Michael F. Horgan, August 30, 2006, at p. 107.

Q. Absent the Holiday Inn Express, if that -- even if they were not there, I believe you indicated that because of the change in circumstances there at that interchange you would not recommend

that the Holiday Inn be granted a long-term license renewal; correct?

A. That is correct.

Id., Horgan at 113. The Parkersburg Holiday Inn was losing occupancy and business from 2003 through January 2007. When the case was tried it still remained a Holiday Inn franchise. Therefore, the DOH's implication that the Parkersburg Holiday Inn's own decision resulted in the closing is not correct. The national Holiday Inn decided that the interchange could not support the franchise.

2. **Access Unaffected**

The DOH also claims that the Holiday Inn's driveway and access remained "precisely the same" after construction. (*See* DOH's Response Brief at p. 2.) This is simply not true. After construction, there was a fence installed which separated Route 50 from the Holiday Inn's driveway. The old Route 50 is cut diagonally at the access; it dead-ends at the Holiday Inn property.

3. **Occupancy Rates**

The DOH contends that the Holiday Inn's occupancy rates did not fall until other, new hotels opened. What the DOH did not say is why they opened. They opened because the Holiday Inn's access was damaged and it was obviously in a poor position to compete. The Holiday Inn's occupancy was based upon the Holiday Inn's Holidex System, which did hold occupancy up for a while. However, as people visited the Holiday Inn and found its access so difficult, the repeat business fell off to nothing and then eventually the Holidex bookings fell off. Because the Holiday Inn in

Parkersburg was a full service Holiday Inn, the national franchisor refused to allow the Holiday Inn to close its restaurant and banquet facility. Therefore, once its occupancy rates fell below its break-even point, the hotel was losing large amounts of money. Even after cutting its employees in half (from over 100 full-time employees), the hotel could not survive. On page 5 of its Response Brief, the DOH claims that the Holiday Inn revenue from room sales "actually increased" from 2003 to 2007. This is not true. The Holidex System helped hold the revenue up for a while, but not through 2007, and it had fallen dramatically.

4. Other Factors

(a) **Raising room rates.**

The DOH claims other factors caused the decline in revenue. This admission that there was a decrease in revenue flies in the face of its argument above that the revenues stayed up. However, the DOH admits on page 4 of its Response Brief that its witnesses testified that raising room rates adversely affected the revenue of the Holiday Inn.

(b) **A big facility.**

The Holiday Inn was a large, 150-room, full service hotel. Of course, it had been a full service hotel with direct access onto Route 50 -- 100 yards from the I-77 exit -- for several years and had operated profitably, employing over 100 full-time employees. The fact that the Holiday Inn was so large means that the access affected it even worse than some others and the DOH knew that. The Holiday Inn's access was damaged and it was obviously in a poor position to compete especially because it was so large.

(c & d) New motels and conference facilities.

As set out above, there were new motels built in the area after it became clear that the Holiday Inn was going to wither off and die. The new access changed the ability of the Holiday Inn to compete. While the Blennerhassett was not new, the Holiday Inn had competed with its facility for years.

5. The Chamber's Meetings

The DOH points out that the local Chamber of Commerce continued to meet at the Holiday Inn. True, but Mr. Kellenberger and the Chamber were simply trying to help it stay afloat. Mr. Kellenberger did not support the DOH's position that access was reasonable.

Therefore, the DOH's argument through page 5 of its Response Brief does not address the issues on appeal but is meant to distract from those issues.

B. FACTS AT ISSUE

The DOH then addresses the following issues:

1. Instruction No. 2.

The DOH continues to claim that the Holiday Inn's objection to the instruction did not preserve it for appeal. The trial court had two sessions to go over the instructions. In the first session, the trial court indicated it was going to give the instruction. The Holiday Inn objected, but, to attempt to blunt the error, requested an addition. At the final instruction conference, the Holiday Inn objected to giving it, **period**. The court gave it anyway.

2. **Testimony of Meers.**

The DOH claims, "No expert attempted to offer opinions concerning the overall quality of the hotel management or claimed to be experts on hotel management." (*See* DOH's Response Brief at p. 6.) The DOH obviously finds itself in a bind knowing Mr. Meers had no basis to offer opinions on hotel management, but that it had obtained opinions from him on those issues. Saying he was not offered as an expert is the same as admitting that he was not an expert. But, Mr. Meers offered numerous opinions on failure of management to make the correct decisions with respect to rates, etc. Mr. Meers testified several times at trial as an expert in hotel management, including the following:

> Q. . . . After you looked at occupancy rate, what did you look at?
>
> A. I examined -- well, I realized that occupancy is just one part of the picture, that you can't just look on occupancy. I know that's been considered extensively here, but occupancy alone does not tell anything about the operations of a property.
>
> **The operator of a property should be attempting to maximize all of their income by choosing the proper rate structure and -- that will generate the best occupancy that will deliver the most money back to the property.** So I realized that all of the factors that create income need to be examined, not just one isolated part of the equation.

Trial Testimony of Rodney Meers at 129-130 (emphasis added). However, **Mr. Meers never appraised this hotel and was never asked to appraise it.**

> Q. My question was simply, you weren't asked to and you did not appraise this property, did you?
>
> A. That is correct, I did not.

Id., Meers at 193. The following, which was in re-direct, clearly demonstrates an appraiser who did no appraisal testifying as an expert in hotel management:

> A. You can't gauge a rate increase on expenses. The traveling public and the market has determined what they're willing to pay for a property. So, just because --
>
> Q. When you say "for a property", you mean for a night --
>
> A. For a night in a hotel room. When you have other properties up and down the interstate at varying rates, you have to match their rates, you can't match their expenses.
>
> Q. And what did you find then when you considered this issue in the context of your analysis? And I'd ask you to just read on in your conclusion from page 57.
>
> A. "That the ADR continued to increased [sic] while occupancy decreased and RevPAR plummeted leads to a conclusion that perhaps other problems are associated with any decline in operations."

Id., Meers at 197-198.

The DOH then attempted to straddle the fence on what Mr. Meers was qualified to do and what he did. (*See* DOH's Response Brief at pp. 6-8.) On page 7, the DOH actually claims that "Mr. Meers was not . . . offered for the issue of whether the Appellant's raising of its rates . . . caused the decrease in occupancy." Of course, he offered those opinions. (*See* Holiday Inn's Brief at pp. 5-9.)

Is it not plainly admitting error to say my expert was never offered as an expert on hotel management but gave opinions anyway on hotel management?

3. Testimony of Cochrane.

The DOH quotes the trial court which blamed the Holiday Inn for confusion surrounding Mr. Cochrane being offered to testify. The trial court made its initial ruling from the bench during trial. At hearing on Holiday Inn's motion for new trial, the court stated, "If there was any confusion . . . it was their [the Holiday Inn's] obligation to clear up that confusion. . . ." The problem with that statement is the word "if." The trial court obviously was not convinced the DOH was confused, and indeed it was not confused. The Holiday Inn had listed this witness and even listed his deposition to be read to the jury. The DOH had discovered every opinion and cross-examined him on every opinion.

If there was a discovery shell game, the game was played by the DOH. (*See* Holiday Inn's Brief at pp. 17-18 & f.n. 7.) But, regardless of the way the witnesses were identified and deposed, Mr. Cochrane was one who was deposed. The DOH was so aware of his testimony that it filed a motion *in limine* late, on the day of pretrial, to exclude his expert testimony. At that point, the trial court had a duty to apply the factors in Prager v. Meckling, 172 W.Va. 785, 310 S.E.2d 852 (1983). It is clear that the trial court never considered those factors prior to its ruling during the trial. There is no way the DOH could have demonstrated any prejudice.

Again, in order to distract from the issue on appeal, the DOH launches into a tirade of misinformation about the discovery of the entire case. (*See* DOH's Response Brief at pp. 10-12.)

4. Other Appraisals.

Mr. Reed's appraisal report was part of the business records of the Holiday Inn. Therefore, it should have been admissible. It was not an expert report prepared for litigation. And, the prior appraisals of Motta and Hartleben are likewise part of the records of the Holiday Inn.

II. ARGUMENT

A. INSTRUCTION NO. 2

The Holiday Inn agrees that instructions must be read as a whole. But where the instruction confuses the standard by which the jury is to determine liability for damages, the instruction should never be given. The DOH's recitation of all the instructions that were given that were accurate statements of the law does not cure the damage done. The jurors are not lawyers or judges. They listen to a trial and at the end are told the applicable law. The most important instruction given to them was under what circumstances the Holiday Inn may recover. Instruction 2 told them something different from what the law is in West Virginia, and something different from what the cases cited stand for.

The DOH's attempt to mitigate (what would seem to at least some jurors) a damnation of the Holiday Inn's position is based on only one part of the instruction -- comparing "convenient" to "reasonable," and claiming it is more liberal and better for the Holiday Inn. (*See* DOH's Response Brief at pp. 19-22.) "Reasonable and adequate" is not the same as "convenient." And, it is confusing to use both. But, it is the overall tenor of the instruction. Coupling the instruction with one which says "unless the DOH

acted capriciously, fraudulently or in bad faith" would mislead most jurors when they are then told "The Constitution does not undertake to guarantee a property owner the public maintenances of the most convenient route to his door," etc. The instruction is a lawyer-judge argument. It is not something a juror should be expected to correctly interpret.

The last sentence is totally confusing, and lawyers and judges know it has nothing to do with the case, but jurors would not. The DOH argues that, "It refers to a legal presumption which the Appellant failed to rebut at trial." This is exactly what the Holiday Inn was afraid of. How could the Holiday Inn know it had a duty to refute this "presumption" at trial?" (*See* DOH's Response Brief at p. 19 & f.n. 2.) As the DOH claims in its argument, "A person need not, and cannot be shown, through evidence, to have a tacit understanding of anything." (*Id.*) This is a legal principle that had absolutely no bearing on the case.

A reading of the DOH's Response Brief accentuates the confusion the jury would be subject to by this instruction. And the trial court gave the jury the instruction to take to the jury room to refer to and review during deliberations.

The DOH's recitals of West Virginia Code and regulations from pages 22-23 were not referenced to the trial court and have nothing to do with the issues on appeal.

B. MEERS' TESTIMONY

The trial court overruled the Holiday Inn's objection to Mr. Meers' qualification to testify as to hotel management issues. Once the Holiday Inn's objection was overruled, Mr. Meers was free to testify about those issues. The Holiday Inn was not

required to object every time he gave an opinion. The trial court did not require the DOH to explain how Mr. Meers was qualified or require any showing whatsoever of his background to qualify him. The DOH claims that the Holiday Inn had to object to every question and answer of Mr. Meers after the court had ruled. (*See* DOH's Response Brief at pp. 35-36.) The court's ruling allowed it in. And the trial court's ruling on the Holiday Inn's motion for new trial does not state any factual basis for its ruling. The court simply stated, "This Court believes Mr. Meers met those qualifications," regardless of the fact that the court also stated that, "The Holiday Inn makes compelling argument as to why one should not believe or accept the conclusions. . . ." But, the Holiday Inn was given no chance to make those arguments at trial. And, the arguments proved he was disqualified. Saying that his credentials "go to the weight" is not enough. It was not simply his credentials. He did not know enough to be cross-examined on the issue. It is not only that he had no education or expertise in marketing a hotel; he did not study the issue for trial. He simply opined that management made bad decisions.

The DOH mischaracterizes Mr. Meers' testimony in an attempt to blunt any prejudice to the Holiday Inn. The DOH claims he "never testified that bad management caused" the problems. (*See* DOH's Response Brief at pp. 27-37.) Compare the DOH's claim of what Mr. Meers testified to with what he really testified to at trial. (*See* Holiday Inn's Brief at 5-10.) And, in the face of the DOH's claim that the attack was not against management, DOH's counsel said in closing:

> The Holiday Inn has made several other business decisions that, as you know, have been somewhat criticized by Mr. Meers, Mr. Gordon and Mr. Pope, and that is, at the time **when occupancy rates were steadily falling, they raised their rates. They raised their - the room charges again and again and again.** While it's true that it was in smaller percentages each year over a course of three or four years, it totaled a 22% increase. And nowadays, in the days of internet, checking on rates, Expedia.com, Hotels.com, the consumer can hit a couple of the buttons and compare rates. You can't afford not to compete on the basis of price.
>
> If the Holiday Inn says, "Well, we had to raise our rates to meet expenses," that's fine. Again, that's their management judgment call, that is not the result of a road project.

(Trial Transcript at 405-406, emphasis added.)

The DOH goes to great length in its brief discussing Mr. Meers' statewide study. The Holiday Inn did not object to him testifying about what he found with respect to access from his expense-paid travels. But, he admitted he did not study the market or the market rates as affecting occupancy. And, even if he had, he did not have the knowledge or ability to relate it to the Holiday Inn. To allow an "appraiser" to testify that the fault of the Holiday Inn's failure was its room rates, not the road, was error and extremely prejudicial.

As the court stated, "I can't say that that's [the Meers' opinion about the Holiday Inn raising rates] ***not*** supported by the evidence." (*See* Transcript of Hearing, September 5, 2007, at pp. 9-10, emphasis added.) Interestingly, however, the trial court could not say or chose not to say it ***was*** supported by the evidence.

The DOH implies that the Holiday Inn offered opinions by its experts on the issue of room rates. But the DOH attacked them on that basis. The DOH's claim that Mr. Meers did not testify based upon excluded testimony is not supported by the trial

court's statement that "it was not convinced the ruling was violated and if it was it was a small part of it."

This was not harmless error as the DOH contends. This was the key to the DOH's expert's basis for the loss of room revenue and the hotel's failure. Blaming the Holiday Inn for its own demise as opposed to other outside influences exacerbated it. In other words, the DOH implied that the Holiday Inn deserved to fail because of its ignorance and misjudgments.

C. COCHRANE'S TESTIMONY

The DOH claims that the Holiday Inn had time to clarify the fact that Mr. Cochrane was going to testify to the opinions in his deposition prior to trial. The problem is that the Holiday Inn had no idea that there was a problem until the pretrial when the DOH hand delivered a motion *in limine* outside the time to file the motion.

The trial court did not rule that there was prejudice to the DOH or that it did not have the opinions. His ruling was based on disclosure, nothing else.

The DOH and the trial court's ruling ignores Syllabus Point 1 in Nutter v. Maynard, 183 W.Va. 247, 395 S.E.2d 491 (1990). If the DOH believed it did not have sufficient disclosures, it should have filed a motion to compel or requested additional information. This is not a case where an un-deposed witness shows up at trial. When the party knows enough to file a motion to exclude the opinions, the party obviously knew the witness had expert opinions.

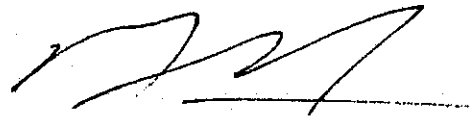
The DOH's position that George Bailey's and David Tenney's testimony are a substitute for a hotel operator and commercial real estate developer is not credible. Mr. Bailey, whose discovery deposition had to be read to the jury because he died, and Mr. Tenney were accountants who had done accounting work for the Holiday Inn for years. But they did not have the experience of Mr. Cochrane. The exclusion of this evidence was not harmless. It was unique and covered aspects of the case not covered by anyone else. (*See* Holiday Inn's Brief at pp. 10-28.)

III. CONCLUSION

The Holiday Inn, therefore, prays that this Honorable Court reverse the judgment below and order that the Holiday Inn is entitled to a new trial, its costs and disbursements, and for such other further and general relief as the Court deems just and proper.

PARKERSBURG INN, INC., a West Virginia corporation

By Counsel



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CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for Appellant, Parkersburg Inn, Inc., do hereby certify that true and exact copies of the foregoing "Reply Brief of Appellant, Parkersburg Inn, Inc." were served upon:

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